

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

VIRGINIA BALE

Claimant

VS.

HUTCHINSON HOSPITAL

Self-Insured Respondent

Docket No. 1,003,853

ORDER

Claimant requested review of the June 28, 2005 Award by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on October 18, 2005.

APPEARANCES

James S. Oswalt, of Hutchinson, Kansas, appeared for the claimant. Kendall R. Cunningham, of Wichita, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, the parties agreed that an award based upon claimant's percentage of functional impairment is not subject to the statutory retirement offset under K.S.A. 44-501(h).¹ It was further conceded that claimant is entitled to, at a minimum, an award for permanent partial disability compensation based upon the 25.5 percent functional impairment for her hip and wrist injury regardless of the outcome of the remaining issues in this case.²

¹ The ALJ's Award included a finding of fact granting claimant the 25.5 percent functional impairment but neglected to include that within the final Award paragraph. In addition, the Award (at p. 12) erroneously refers to a 30 percent functional impairment when in fact, the appropriate figure is 25.5 percent as reflected on p. 11.

² In other words, the parties agree that claimant injured her hip and her wrist by accident, although claimant continues to maintain her shoulder complaints are causally related to her accident as well. And therefore her functional impairment should be higher. Conversely, respondent believes all claimant is entitled to relative to her accident is the 25.5 percent functional impairment.

ISSUES

The ALJ found that claimant injured her right wrist and right leg/hip due to a January 25, 2001 fall. In doing so, the ALJ expressly concluded claimant's subsequent shoulder complaints were not caused by her work-related injury. He found claimant had a 25.5 percent whole body functional impairment and further found she was permanently and totally disabled. However, the ALJ went on to find that respondent was entitled to an offset against the permanent total disability compensation for the amount of social security retirement benefits under K.S.A. 44-501(h), thereby greatly diminishing the benefits claimant recovers as a result of her injury.

The claimant requests that the Board modify the ALJ's Award and find that her rotator cuff injury was directly connected to her work injury and her need to use assistive devices following her fall. Claimant also asks that the Board find there was insufficient evidence presented to find a preexisting impairment relative to her right hip. Based on both these arguments, claimant believes her functional impairment should be increased. Finally, claimant contends that respondent is not entitled to an offset against her permanent total disability award because the statutory retirement offset set forth in K.S.A. 44-501(h) does not apply. Claimant maintains she had returned to work after receiving her social security retirement benefits and then was injured.³ Thus, she was effectively supplementing her income at the time of her injury and is therefore exempt from the effect of the statute under the rationale in *Dickens*.⁴

Respondent essentially argues that the Award should be affirmed, although respondent concedes claimant should be paid for her functional disability of 25.5 percent. Respondent no longer argues that claimant's hip injury and the surgery performed to address those complaints were unrelated to her accident, or that she is not permanently and totally disabled. Rather, respondent merely contends it is responsible for only the functional impairment of 25.5 percent and any additional amount remaining after the statutory retirement offset is applied.

The issues to be resolved in this appeal are as follows:

1. Whether claimant's shoulder complaints are causally related to her work-related fall on January 25, 2001;
2. Whether there is sufficient evidence of a 15 percent preexisting impairment; and
3. Whether claimant's Award is subject to the statutory offset contained in K.S.A. 44-501(h) for retirement benefits.

³ Claimant's Brief at 7 (filed Aug. 16, 2005).

⁴ *Dickens v. Pizza Co.*, 266 Kan. 1066, 974 P.2d 601 (1999).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ provided a detailed and lengthy recitation of the pertinent facts which the Board finds is accurate and adopts as its own, except as modified herein.

The ALJ concluded that claimant's shoulder complaints were not causally related to her work injury. He reasoned that:

Claimant was unable to testify as to the origins of her shoulder complaints. The authorized treating physician did not believe the shoulder complaints were related to [c]laimant's fall because they were almost two years after the accident before presenting. Dr. Brown's opinion that the shoulder was related to the fall was premised upon an inaccurate history from an unreliable source. Claimant had already been exhibiting mental confusion in her contacts with her physicians since January, 2002, two and one-half years prior to Dr. Brown's examination. The quality of the history given to Dr. Brown, and on which he relied, is questionable, at best. Dr. Niazi, as [c]laimant's treating physician over time, had the best opportunity to determine the origin of [c]laimant's right shoulder complaints and to related [sic] them, if possible, to her January 25, 2001 fall. He was unable to do so, noting that it was over two years before those complaints presented.⁵

The Board has considered the ALJ's reasoning and agrees. The doctors were unable to unanimously attribute claimant's shoulder complaints to the fall. Dr. Brown was relying on claimant's recitation of her complaints and suggested that the severity of her hip and wrist injuries may have overshadowed her shoulder complaints. Unfortunately, claimant has now succumbed to dementia and is unable to accurately relay the history of her complaints. Dr. Niazi testified that he investigated the shoulder complaints, but concluded they were not related to the accident. He explained that torn rotator cuffs can happen with age, slowly deteriorating over time. Dr. Niazi further indicated that although the use of a walker could have aggravated her shoulder, claimant made no such complaints while using the device and it was a significant period of time following the accident before claimant began to voice complaints about her shoulder. The Board finds no reason to disturb the ALJ's decision to exclude the shoulder from the permanency award. Thus, that aspect of the ALJ's Award is affirmed.

Likewise, the Board finds the ALJ's factual determination that claimant had a pre-existing 15 percent functional impairment due to her earlier hip replacement is well reasoned and should not be disturbed. Both Drs. Brown and Niazi testified that an individual who had undergone a hip replacement would, under the 4th Edition of the

⁵ ALJ Award (Jun. 28, 2005) at 11-12.

Guides,⁶ have a minimum of 15 percent permanent partial whole body impairment. This impairment figure accounts for a good result from a hip replacement procedure which, based upon the evidence, is what claimant had in this instance. Following her hip replacement in 1990, claimant ultimately returned to work as a housekeeper for respondent. Thus, under these facts, the Board agrees with the ALJ's finding as to claimant's preexisting impairment of 15 percent. Accordingly, claimant is entitled to the 25.5 percent awarded by the ALJ.⁷ This figure is unaffected by any offset and is due and payable.

The more significant issue in this case is the retirement offset authorized by K.S.A. 44-501(h). That statute provides as follows:

If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefits payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of such retirement benefits, less any portion of any such retirement benefits, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefits be less than the workers compensation benefits payable for the employee's percentage of functional impairment.⁸

The purpose of this statute is to prevent wage loss duplication.⁹ This statutory offset applies to those injuries that occur *before* an employee retires.¹⁰ In other words, if a claimant is injured before he or she retires, the employer is entitled to the statutory offset as an injured employee is not entitled to recover both retirement benefits and workers compensation benefits beyond the value of the functional impairment.¹¹ Conversely, if an employee retires and then returns to work to supplement his or her income, the Kansas Supreme Court has determined that the offset does not apply as the employee was

⁶ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

⁷ The ALJ gave equal weight to both functional impairments issued by these physicians which yielded a 37.5 percent functional impairment for the hip injury. He then deducted 15 percent from that sum, which yields 22.5 percent. That figure, when added to the 4 percent whole body impairment for the wrist fracture yields a net sum of 25.5 percent. As noted above, the ALJ erroneously referred to a 30 percent functional impairment on p. 12 of the Award.

⁸ K.S.A. 44-501(h).

⁹ *McIntosh v. Sedgwick County*, 32 Kan. App. 2d 889, 91 P.3d 545 (2004).

¹⁰ *Id.* at 897, 91 P.3d at 550.

¹¹ K.S.A. 44-501(h); See also *McIntosh*, *supra*.

supplementing his income and the worker's receipt of both workers compensation benefits and social security retirement benefits were not duplicative.¹² Thus, the sequence of this claimant's "retirement" from her job with respondent, her return to work and when she began receiving social security benefits is crucial to the determination of whether the statutory offset applies. There is no dispute about the following events and dates:

Claimant first ceased working ¹³	June 15, 1992
Claimant returned to work	October 30, 2000
Claimant was injured	January 25, 2001
Claimant ceased working	June 19, 2002

There is very little evidence within the file to indicate claimant's reason for ceasing her work activities in 1992. She had undergone a hip replacement in 1990 or 1991 and had a variety of other restorative procedures. Thus, it is reasonable to assume her decision to stop working may have been impacted by those events. Claimant's own brother, Claude Bailey, was not altogether aware she had ever stopped working before 2002. And while claimant's counsel has characterized this as a "retirement", it is clear that claimant was not yet qualified for federal retirement benefits as of 1992.¹⁴

Nevertheless, claimant returned to work in 2000 when she was 68 years old. At this point, claimant was still handling her own financial affairs. Although she was clearly age eligible, there is no documentary evidence suggesting claimant had applied for and was receiving social security benefits at this time in her life. Her brother, who would later step in and serve as her conservator in 2002, testified that claimant had been receiving social security retirement benefits ever since her retirement in '91 or '92.¹⁵ He produced documentary evidence showing that claimant had been receiving monthly social security checks since 2002. However, he had no documents indicating when those benefits actually began. Nevertheless, he did testify, in response to leading questions, that claimant was receiving social security benefits when she returned to work in October 2000.¹⁶

¹² *Dickens v. Pizza Co.*, 266 Kan. 1066, 974 P.2d 601 (1999); *McIntosh*, supra.

¹³ Claimant has termed this decision as a "retirement". However, it is undisputed that claimant was not yet qualified for social security retirement benefits at this time, having been born on January 2, 1932 and not yet having reached the qualifying age for either retirement or early retirement under 42 U.S.C. § 402(a)(2) and there is no allegation that claimant was ever receiving social security *disability* benefits.

¹⁴ See footnote 11.

¹⁵ Bailey Depo. at 9.

¹⁶ *Id.* at 8-9.

The ALJ held that “the evidence in the record fails to establish that [c]laimant was receiving Social Security retirement benefits prior to her January 25, 2001 injury.”¹⁷ He went on to explain -

The only evidence to that effect comes from her conservator and brother, Claude Bailey, who acknowledges that he doesn’t know when [c]laimant retired and had no information as to her finances until he began helping her in 2002, **after** her injury. Documentation was introduced evidencing the Social Security benefits received in 2002 and after, but no evidence was presented as to the amount of social security benefits received prior to 2002.¹⁸

The resolution of this issue turns upon one fact - whether claimant was receiving retirement benefits before she was injured. If she was receiving those benefits, thus supplementing her income, then her injury and her subsequent permanent total disability status are unaffected by the statute and its offset provisions.

The ALJ concluded the brother’s testimony “fails to establish that he ever inquired or determined the receipt of Social Security benefits prior to 2002. If [c]laimant is to enjoy the exception to **K.S.A. 44-501(h)**, she has the burden of establishing the facts to bring her within the exception.”¹⁹ Thus, claimant’s permanent total disability award was offset by the weekly value of her retirement benefits.

The Board has considered the ALJ’s reasoning on this issue and finds that his conclusion must be reversed. The Board agrees that it is claimant’s burden to establish it is more probably true than not that she had been receiving retirement benefits before she had returned to work and suffered her injury in January 25, 2001. And a majority of the Board likewise finds that claimant has met that burden. Given claimant’s health issues, both those associated with this injury and others, including bilateral knee replacements and a left hip replacement, it seems more plausible that claimant would have applied for social security benefits when she was eligible. And it is equally logical that at the age of 68 claimant was receiving social security benefits and returned to work to supplement those benefits. While it is unfortunate that claimant is unable to testify as to when she applied for social security benefits, her brother testified that she had been receiving those benefits at the time she had returned to work in 2000. While his knowledge of her financial affairs is limited in scope and some sort of documentary evidence from the Social Security Administration would certainly have dispositively addressed any questions, Mr. Bailey’s testimony is uncontroverted. Thus, the Board finds that claimant has established it is more probably true than not that she was supplementing her income at the time of her injury. Thus, under the *McIntosh* rationale, K.S.A. 44-501(h) does not apply and

¹⁷ ALJ Award (Jun. 28, 2005) at 13.

¹⁸ *Id.* (emphasis in original)

¹⁹ *Id.*(emphasis in original)

respondent is not entitled to any offset. Claimant is entitled to the full value of her permanent total disability Award.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated June 28, 2005, is affirmed in part and modified in part as follows:

The claimant is entitled to 156.69 weeks temporary total disability compensation at the rate of \$196.28 per week or \$30,755.11 followed by permanent total disability compensation at the rate of \$196.28 per week not to exceed \$125,000 for a permanent total general body disability.

As of November 10, 2005 there would be due and owing to the claimant 156.69 weeks of temporary total disability compensation at the rate of \$196.28 per week in the sum of \$30,755.11 plus 93.31 weeks of permanent total disability compensation at the rate of \$196.28 per week in the sum of \$18,314.89 for a total due and owing of \$49,070, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$75,930 shall be paid at \$196.28 per week until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of November, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENTING OPINION

The undersigned Board Member respectfully dissents from the majority's opinion. The record is devoid of any conclusive evidence that claimant was, in fact, receiving social security retirement benefits before her injury. While she may have been qualified for those

benefits, the majority requires a leap of faith in the evidence in order to sustain its factual outcome. It was claimant's burden to come forward with evidence that claimant or someone on her behalf applied for the monthly benefits to which she was entitled. The record contains nothing before 2002 that suggests claimant was actually receiving such benefits. While her brother testified that she was receiving social security, he was not involved in her finances until 2002, after her accident. He testified at one point that he did not even know she had ceased working in 1992, but in another instance he acknowledged that as her first "retirement". This Board Member finds the evidence is conflicting and as such, would find the claimant has failed to meet her burden of showing that the statutory retirement offset does not apply to her Award.

BOARD MEMBER

c: James S. Oswalt, Attorney for Claimant
Kendall R. Cunningham, Attorney for Self-Insured Respondent
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director